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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 519

In the Matter of the Application of

JEROME BRICKER,

Petitioner,

for Admission to the Bar of the State of New York

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	6
I. It is a violation of due process of law to deny petitioner's renewed application on the basis of his 1967 change of residence because such a change of residence would not have been prejudicial to petitioner but for New York's unconstitutional denial of his original application	7
II. It is a violation of due process of law to retroactively apply New York's new residence requirements to petitioner's 1961 application for admission to the Bar	11
Conclusion	13
Appendix 1—Order Denying Motion for Reconsideration of Application for Admission to the Bar	1a
Appendix 2—Order Granting Renewal of Application	3a
Appendix 3—Order Denying Application	5a
Appendix 4—Order Granting Leave to Appeal	7a
Appendix 5—Order of the Court of Appeals	9a

Table of Authorities

PAGE

Cases:

Boyd v. United States, 116 U.S. 616 (1886) 7
Byars v. United States, 273 U.S. 28 (1927) 7

Campbell v. Esperdy, 287 F. Supp. 92 (S.D.N.Y. 1968) 10

Gay v. Brownell, 120 F. Supp. 319 (D. P. Rico 1954) .. 10

Mapp v. Ohio, 367 U.S. 643 (1961) 7, 8
McLeod v. Peterson, 283 F. 2d 180 (3rd Cir. 1960) 8, 9
Moser v. United States, 341 U.S. 41 (1951) 8

Olmstead v. United States, 277 U.S. 438 (1928) 7

Pierno v. Immigration and Naturalization Service, 397 F. 2d 949 (2nd Cir. 1968) 9, 10

Tejeda v. Immigration and Naturalization Service, 346 F. 2d 389 (9th Cir. 1965) 9

Weeks v. United States, 232 U.S. 383 (1914) 7
Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) 4

Constitutional Provisions:

United States Constitution

Fourth Amendment 8
Fourteenth Amendment 3

PAGE

Rules:

Rules of Civil Practice 1(e) 11

New York Civil Practice Law and Rules:

Rule 9403(3) (1963 ed.) 11
Rule 9406(3) (1965 ed.) 3,5

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In the Matter of the Application of

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for Admission to the Bar of the State of New York

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in Application of Jerome Bricker for Admission to the Bar of New York, on May 28, 1969.

Opinions Below

Petitioner's application for admission to the New York State Bar was denied by the Appellate Division, Second Department, on May 7, 1962. A motion for reconsideration was denied on November 26, 1962. A motion to renew petitioner's application was granted by the Appellate Division, Second Department, on October 26, 1966. Petitioner's renewed application was denied on March 18, 1968 by the

Appellate Division, Second Department. A motion for leave to appeal to the Court of Appeals was granted on May 20, 1968. The Court of Appeals affirmed the denial of petitioner's application on May 28, 1969.

No opinions have been rendered herein. The above-mentioned orders of the New York Courts are printed in the Appendix *infra*.

Jurisdiction

The judgment of the New York Court of Appeals was entered on May 28, 1969. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented

1. Is it a violation of due process of law for New York to deny petitioner's application for admission to the bar solely on the basis of a 1967 change in residence, when petitioner's original application was unconstitutionally denied in 1962?

2. Is it a violation of due process of law for New York to retroactively apply its new residence requirements to petitioner's attempt to correct the unconstitutional denial of his 1961 application for admission to the bar?

Constitutional and Statutory Provisions Involved

Article XIV, Amendments to the Constitution of the United States (in part):

> "No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York Civil Practice Law and Rules, Rule 9406(3) [eff. 1965].

No person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney and counselor at law in the courts of this state, unless he shall furnish satisfactory proof to the effect:

3. that he has been an actual resident of the state of New York for six months immediately preceding the submission of his application for admission to practice and that such residence has continued until the final disposition of the application for admission to practice.

New York Civil Practice Law and Rules, Rule 9406(3) [in effect prior to 1965, derived from Rule 1(e) of the Rules of Civil Practice].

No person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney and counselor at law in the courts of this state, unless he shall furnish satisfactory proof to the effect:

3. that he has been an actual resident of the state of New York for six months prior to the filing of his application for admission to practice.

Statement of the Case

In February 1961, the petitioner herein, Jerome Bricker, applied for admission to the Bar of the State of New York. Utilizing pre-*Willner* investigation procedure, the Committee on Character and Fitness for the Second Judicial Department recommended that petitioner's application be denied. On May 7, 1962, the Appellate Division, Second Department, accepted the Committee's recommendation and denied petitioner's application.

At no time during the investigation was the petitioner informed of the nature of the evidence, if any, against him, or permitted any opportunity to present rebuttal evidence. He was permitted neither to confront nor to cross-examine his accusers.

On May 13, 1963, this Court in *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96 (1963), condemned the failure to afford applicants for admission to the New York State Bar an adequate "due process" hearing. Under the minimal standards set forth in *Willner,* petitioner's 1961 application was undoubtedly denied without due process of law.

In 1966, represented by counsel for the first time, petitioner moved in the Appellate Division, Second Department to reopen the denial of his application based upon *Willner*. This motion was ultimately granted and on October 26, 1966, petitioner's application was referred to the Commit-

tee on Character and Fitness for a determination of petitioner's then character and fitness to become an attorney.

After having submitted a questionnaire to the Committee in January, 1967, petitioner was finally notified that a hearing was to be held on his application on June 22, 1967. Approximately two weeks after this hearing, petitioner voluntarily notified the Committee that he had purchased a home in New Jersey, within commuting distance of New York City.

The Committee thereupon determined that petitioner no longer complied with the residence requirements of Section 9406(3), of New York's Civil Practice Law and Rules, effective September 1, 1965, requiring for the first time that a bar applicant maintain continuous residence in New York during the period of the pendency of his application. Prior law had required only that an applicant have been a resident of New York prior to filing his application, thereby permitting residence in New Jersey or Connecticut during an application's pendency. It thereupon recommended against admission on the grounds of non-residence. The Appellate Division accepted the Committee's recommendation and the New York Court of Appeals affirmed, solely on the basis on non-residence.

At issue, therefore, is whether the 1965 change in New York law concerning continuing residence for Bar admission, and the 1967 change in the place of petitioner's residence, both of which occurred during the five year lapse period between the violation of petitioner's constitutional rights in 1962 and the attempt at their vindication in 1967, may constitutionally preclude any effective relief.

Reasons for Granting the Writ

Under the most ideal conditions a period of time must inevitably elapse between the violation of a constitutional right and the vindication of that right by a competent authority. This case raises the issue of the extent to which a change of circumstances during the inevitable lapse period between the violation of a constitutional right and its vindication may be the basis of precluding any vindication whatsoever.

If such a change in circumstances is either the result of the constitutional violation, or would not have been prejudicial to the wronged party but for the constitutional violation, due process of law prohibits such a change in circumstances from precluding ultimate vindication of the wronged party's constitutional rights.

I.

It is a violation of due process of law to deny petitioner's renewed application on the basis of his 1967 change of residence because such a change of residence would not have been prejudicial to petitioner but for New York's unconstitutional denial of his original application.

Over six years after his original application was unconstitutionally denied, and over six months after his renewed application had been filed with the Committee on Character and Fitness, petitioner was compelled to purchase a larger home in order to care for his invalided father. He purchased that home in New Jersey, within commuting distance of New York City. New York has seized upon this change in petitioner's factual circumstances to deny his attempt to redress the unconstitutional denial of his application for admission to the Bar. The utilization by New York of this change in petitioner's circumstances, which, but for New York's unconstitutional denial of his application in 1962, would have been irrelevant, is an attempt by New York to benefit as a result of its own unlawful conduct. As such it must be rebuffed.

The thesis that a government may not exploit the fruits of its own illegal action is certainly not a novel one. This Court has not hesitated to enforce it rigorously at both the federal and state levels. E.g., *Boyd* v. *United States,* 116 U.S. 616 (1886); *Weeks* v. *United States,* 232 U.S. 383 (1914); *Byars* v. *United States,* 273 U.S. 28 (1927); *Olmstead* v. *United States,* 277 U.S. 438 (1928); *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

In addition to the cases arising under the Fourth Amendment climaxing in *Mapp*, this Court has prevented the government from relying upon the results of official misconduct.

In *Moser* v. *United States*, 341 U.S. 41 (1951), this Court invoked the principle of "elementary fairness" to prevent an alien from forfeiting his rights to American citizenship on the basis of unclear and conflicting advice from the Department of State and the Swiss legation. Chief Justice Minton reasoned that but for the unfair action of the government, the alien would never have found himself in a vulnerable position. He, therefore, refused to permit the government to assert the vulnerability against him.

In *McLeod* v. *Peterson*, 283 F. 2d 180 (3rd Cir. 1960), the Third Circuit refused to permit the results of an unlawful governmental act to deprive an alien of his status as a "resident" of the United States.

In *McLeod*, an alien who was lawfully declared deportable in 1956 was erroneously denied permission to petition for discretionary suspension of deportation at that time. He thereupon voluntarily left the country after having been assured by Immigration officials that he could return pursuant to a non-quota visa. He was unable to secure such a visa and illegally returned to the United States approximately one year later. He was arrested in 1958 and deportation proceedings were commenced. The alien once again petitioned for discretionary suspension of deportation, but his petition was denied on the ground that his one year absence from the United States prevented him from meeting the requirement of "five years of continuous residence."

Chief Judge Biggs, writing for a unanimous Court, observed:

> "Had that right [to apply originally for discretionary suspension in 1956] been granted, as it should have been, the appellant would have been entitled to a stay of deportation pending the Attorney General's disposition. Thus, it is plain that absent the illegal action of the Immigration authorities, McLeod might not have lost the right that he now seeks." 283 F. 2d at 187.

The Court went on to rule that McLeod's sojourn in Canada, traceable as it was to governmental error, could not be used against him.

In *Tejeda* v. *Immigration and Naturalization Service,* 346 F. 2d 389 (9th Cir. 1965), the Ninth Circuit ruled that if a Consular official in Manila had incorrectly denied Tejada re-admission to the United States in 1947, he was entitled to re-admission in 1962, despite the fact that the statute pursuant to which he should originally have been admitted had expired in 1951.

In *Pierno* v. *Immigration and Naturalization Service,* 397 F. 2d 949 (2nd Cir. 1968), the Second Circuit refused to permit the occurrence of an event during an overly long period of investigation to bar an alien from adjusting her status to permanent resident.

In *Pierno,* an alien petitioned for adjustment of status immediately after her marriage to an American citizen. Several months later, the husband's son by a former marriage commenced a baseless action in New York Supreme Court seeking to annul the marriage. Further proceedings on Mrs. Pierno's petition for adjustment of status

were thereupon stayed by the Immigration Service, pending the outcome of the annulment action. The annulment action was dismissed on December 16, 1964. Seven days later Mr. Pierno died. The Immigration Service then denied Mrs. Pierno's petition on the ground that her husband was no longer alive. The Court refused to permit Mr. Pierno's death to automatically result in a denial. Judge Smith noted that had Mrs. Pierno's petition been determined in the normal course, she might have been granted adjustment of status prior to her husband's untimely death. 397 F. 2d at 951. He ruled that when governmental delays in processing an application occur, events which occur during the lapse period ought not, on grounds of elemental fairness, be used against a petitioner. See also, *Campbell* v. *Esperdy,* 287 F. Supp. 92 (S.D.N.Y. 1968); *Gay* v. *Brownell,* 120 F. Supp. 319 (D. P. Rico 1954).

Thus, an equitable principle, akin but not identical to estoppel has emerged holding that no circumstance which would not have been prejudicial but for the culpable act of a governmental official may be asserted against the victim of such an act. Such an equitable principle is a major safeguard in guaranteeing the existence of meaningful relief from unlawful governmental activity.

The facts of the instant case bear witness to the wisdom of such a principle. Bricker has been denied any opportunity to redress the 1962 violation of his constitutional rights because of a situation which would never have arisen but for that very violation. Due process of law mandates that the change in Bricker's circumstances, attributable as it is to unconstitutional governmental action, may not be asserted against him.

II.

It is a violation of due process of law to retroactively apply New York's new residence requirements to petitioner's 1961 application for admission to the Bar.

In 1961, when petitioner filed his application for admission to the Bar, New York law required merely that an applicant be a New York State resident for at least six months prior to the date of his application. Once the application had been filed, a bar applicant was free to take up residence in another state. *Rules of the Civil Practice 1(e)*. See, §9403(3) CPLR (1963 ed.). In 1965, the residence requirements were amended to provide that an applicant must remain a New York State resident during the pendency of his application. Since petitioner purchased a home in New Jersey in 1967, the New York Courts ruled that he failed to meet the 1965 residence requirement and denied his application "solely on the ground that applicant failed to comply with all the requirements as to residence." Appendix, *infra* at 5a.

There is no doubt that Bricker satisfied the residence requirements in effect in 1961, when he originally applied for admission to the bar. There is equally no doubt that if those 1961 residence requirements were applied to his current attempt to secure admission to the bar, he would satisfy them. However, because the residence ground rules have been amended subsequent to the unconstitutional denial of Bricker's application in 1962, New York has ruled that Bricker is barred from benefiting from the new, constitutionally mandated due process hearing.

New York has made such a ruling despite the fact that but for the delay occasioned by the failure of the Com-

mittee on Character and Fitness to afford Bricker a due process hearing on his original application, the issue of residence would never have entered the case.

To rule, as has New York, that a person is disabled from righting a constitutional wrong because of technical amendments in the law, occurring subsequent to the violation, is to significantly impede the access of our citizens to the vindication of their constitutional rights.

When constitutional rights have been denied, it ought to be the ideal of our judicial system to attempt to place a wronged party in the position which he would have occupied had no constitutional violation occurred. By permitting intervening amendments in the law to retroactively prevent the the vindication of a constitutional right, that noble idea is frustrated, and the original violation of a constitutional right is fossilized.

It is, of course, settled law that certain civil statutes may be applied retroactively without violating the constitution. However, where such a retroactive application frustrates the vindication of a constitutional right, as it does in this case, the retroactive application must be condemned.

This case presents an issue of great importance in insuring the effectiveness of judicial vindication of federal rights. If a government may shield its misdeeds from judicial scrutiny as a result of circumstances traceable to those very misdeeds, the guaranty of due process of law may, in many instances, be reduced to an illusion.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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August 1969

APPENDIX 1

Order Denying Motion for Reconsideration of Application for Admission to the Bar

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 26th day of November, 1962.

Present:

HON. GEORGE J. BELDOCK,
Presiding Justice.
" HENRY L. UGHETTA,
" PHILIP M. KLEINFELD,
" MARCUS G. CHRIST,
" ARTHUR D. BRENNAN,
Justices.

In the Matter of

JEROME BRICKER,

Applicant.

The above named Jerome Bricker, also known as Jerome L. Bricker and Jerry Bricker, having made an application, dated February 20, 1961, to the Appellate Division of the Supreme Court, Second Judicial Department, upon a certificate of the State Board of Law Examiners, dated January 18th, 1961, for admission as an attorney and counselor at law of the State of New York, and the said application having been referred to the Committee on Character

and Fitness for the Second and Tenth Judicial Districts, in and for the Second Judicial Department, for investigation, and the report of said Committee on Character and Fitness having been duly filed, and this court by order dated and entered May 7th, 1962, having denied said application for admission to the Bar upon the ground that the applicant has failed to satisfy this court that he possesses the character and general fitness requisite for an attorney and counselor at law (Judiciary Law, Sec. 90, subd. 1a), and the said applicant having moved for reconsideration of his application for admission to the Bar or for other relief, by a notice of motion, dated October 26, 1962.

Now on reading and filing said notice of motion, the affidavit of Jerome Bricker, and all the papers filed herein, and the said motion having been submitted by Jerome Bricker, the applicant in person, and due deliberation having been had thereon:

It is Ordered that the said motion for reconsideration of application for admission to the Bar or for other relief, be and the same hereby is denied.

Enter:

JOHN J. CALLAHAN
Clerk.

APPENDIX 2

Order Granting Renewal of Application

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 26th day of October, 1966.

Present:

HON. GEORGE J. BELDOCK,
Presiding Justice.
" HENRY L. UGHETTA,
" MARCUS G. CHRIST,
" ARTHUR D. BRENNAN,
" L. BARRON HILL,
Justices.

In the Matter of the application of

JEROME BRICKER,

Petitioner,

for admission to the Bar.

The above named Jerome Bricker, by petition verified July 20, 1966, having made an application to this court for a hearing and determination de novo of his prior application for admission to the Bar of the State of New York, previously denied by orders of this court dated May 7, 1962 and November 26, 1962;

Now, on reading and filing said petition, affidavits of Abraham Melamed, Henry York, Bernard H. Loizzo and Rabbi Abraham Kupchik in support of said application and the application having been submitted by Abraham Melamed, Esq., of counsel for petitioner and due deliberation having been had thereon; and upon the decision slip of the court herein, it is:

ORDERED that the petition is hereby referred to the Committee on Character and Fitness of the Second Judicial District for: (a) investigation and hearing as to whether the applicant presently possesses the requisite character and fitness for an attorney at law; and (b) a report setting forth the Committee's findings and recommendations; and it is further

ORDERED in the event the Committee recommends denial of the application, its report shall contain appropriate findings showing the basis for the recommendations. In the event the Committee recommends that the applicant be admitted to the Bar, no findings need be set forth in the report; and it is further

ORDERED that pending the investigation, hearing and report, the application shall be held in abeyance.

Enter:

HERMAN M. POGUL
Clerk of the Appellate Division

APPENDIX 3

Order Denying Application

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on March 18, 1968.

HON. GEORGE J. BELDOCK,
Presiding Justice.
HON. MARCUS G. CHRIST,
HON. ARTHUR D. BRENNAN,
HON. SAMUEL RABIN,
HON. JAMES D. HOPKINS,
Justices.

In the Matter of the Application of

JEROME BRICKER,
Petitioner,

for admission to the Bar.

The above named Jerome Bricker, by petition verified July 20, 1966 having made an application to this court for a hearing and determination de novo of his prior application for admission to the Bar of the State of New York, previously denied by orders of this court dated May 7, 1962 and November 26, 1962; the said application and all the papers thereon having been considered by this court and after due deliberation and upon the opinion and decision slip of the court herein, heretofore filed, it is:

ORDERED that the renewed application for admission to the Bar is hereby denied on the sole ground that the applicant has failed to comply with all the requirements as to residence in New York (CPLR 9406; Rule II of the Court of Appeals' rules for Admission of Attorneys and Counselors-at-law).

Enter:

HERMAN M. POGUL
Clerk of the Appellate Division

APPENDIX 4

Order Granting Leave to Appeal

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department held in Kings County on May 20, 1968.

HON. GEORGE J. BELDOCK,
Presiding Justice.

HON. MARCUS G. CHRIST,
HON. ARTHUR D. BRENNAN,
HON. SAMUEL RABIN,
HON. JAMES D. HOPKINS,
Associate Justices.

In the Matter of:

JEROME BRICKER

For Admission to the Bar of the State of New York.

The above-named JEROME BRICKER, petitioner, having moved this court, by notice of motion dated April 12, 1968, (1) to vacate the order of this court dated March 18, 1968 and to direct that he be admitted to the Bar or (2) in the alternative, to vacate said order and other orders and for reconsideration or (3) in the further alternative, for leave to appeal to the Court of Appeals;

Now, upon the papers filed in support of said motion, and there being no opposition thereto; and upon all the other papers filed herein and upon all the proceedings heretofore had; and the matter having been submitted by Irene Weiss, Esq., of counsel for the petitioner; and due deliberation having been had thereon; it is:

ORDERED that the said motion is hereby granted to the extent of granting petitioner leave to appeal to the Court of Appeals from the order of this court dated March 18, 1968. In our opinion, questions of law have arisen which ought to be reviewed. In all other respects, motion denied.

Enter:

HERMAN M. POGUL
Clerk of the Appellate Division

APPENDIX 5

Order of the Court of Appeals

COURT OF APPEALS
OF THE STATE OF NEW YORK

No. 361

In the Matter of the Application of

JEROME BRICKER,

Appellant,

For Admission to the Bar of the State of New York,

COMMITTEE ON CHARACTER AND FITNESS,
SECOND JUDICIAL DEPARTMENT,

Respondent.

Order affirmed, without costs, solely on the ground that the applicant failed to comply with all the requirements as to residence (CPLR 9406).

No opinion.

Concur: Fuld, Ch. J., Burke, Scileppi, Bergan, Breitel and Jasen, JJ.

May 28, 1969